Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

BAYSHORE NATIONAL BANK OF LA PORTE, Petitioner

v.

DEAN RAY EVANS & JANE ELAINE EVANS, Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

****

PETITION FOR A WRIT OF CERTIORARI

****

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LAPORTE

40 pp

QUESTIONS PRESENTED

1. Whether a debtor's intent or motivation, rather than the type of transfer, is the operative element for determining whether a debtor should be discharged under 11 U.S.C. § 727(a)(2)(A).

2. Whether a debtor's intent behind a transfer is inherently an issue of fact which should not generally be subject to disposal by summary judgment.

3. Whether the statutory period of one year under 11 U.S.C. § 727(a)(2)(A) directly conflicts with the statutory period of states' fraudulent transfer statutes such as the Texas Fraudulent Transfer Act, Tex. Bus. & Comm. Code § 24.001 *et. seq.* (Vernon 1993).

4. Whether an equitable lien can be imposed on an exempt homestead when a debtor, with an intent to hinder, delay or defraud creditors, transfers all of his nonexempt assets into that exempt homestead.

LIST OF ALL PARTIES

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

BAYSHORE NATIONAL BANK OF LA PORTE, Petitioner

v.

DEAN RAY EVANS & JANE ELAINE EVANS, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bayshore National Bank of La Porte respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (APP-1 - APP-3) is unreported and is listed in the Fifth Circuit Slip Opinions at Page 2771. The judgment of the District Court (APP-4 - APP-5) and the judgment of the Bankruptcy Court (APP-6 - APP-13) are unreported. No opinions were issued. The bankruptcy findings were made on the record and are provided in the Appendix (APP-14 - APP-30).

JURISDICTION

The Court of Appeals entered its judgment on February 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

1. 11 U.S.C. § 727 - Due to its length, the entire statute is reprinted in the Appendix pursuant to Supreme Court Rule 14. *See* APP-31 - APP-34.

2. Texas Fraudulent Transfer Act, Tex. Bus. & Comm. Code 24.001 *et seq.* (Vernon 1993) - Due to its length, the entire statute is set forth in the Appendix pursuant to Supreme Court Rule 14. *See* APP-35 - APP-50.

STATEMENT

I. Statement of Facts

In 1984, Respondents Dean Ray Evans and Jane Elaine Evans ("Respondents") executed two promissory notes (the "Notes") payable to Petitioner Bayshore National Bank of La Porte ("Petitioner"). In 1987, Respondents defaulted in payment of the notes. When Petitioner made demand on Respondents for payment, Respondents filed suit against

Petitioner in Texas state court (the "State Litigation"). Petitioner counterclaimed against Respondents for the sums owing under the Notes.

At the time Respondents sued Petitioner, Respondents had substantial cash and owned their homestead, rental homes, unencumbered real property in several counties, stocks and bonds.

Shortly after filing the State Litigation against Petitioner, Respondents engaged in a systematic conversion of all their nonexempt assets into exempt assets by selling their properties, stocks and bonds, encumbering with liens any unencumbered property, and converting their mutual fund to cash. Respondents then used all of their cash to purchase a more expensive homestead. When asked, Respondents denied that any changes in their assets had occurred. Petitioner was further precluded from finding out if there had been any change in Respondents' assets because of the pending State Litigation. Respondents, however, were not able to shield all of their cash assets in their new homestead,

so in January 1989, Respondents purchased two cashier's checks in the amounts of $22,000 and $11,000.

In February 1991, after Respondents had converted their nonexempt assets into their new exempt homestead and purchased the cashier's checks, Respondents agreed to a consent judgment against them for the full amount owed to Petitioner (the "Consent Judgment").

After receiving the Consent Judgment, Petitioner garnished Respondents' bank accounts at Texas Coastal Bank. When Texas Coastal Bank answered the garnishment, it stated that there were two outstanding cashier's checks, but that it did not know the location of the cashier's checks. After receiving Texas Coastal Bank's answer to the garnishment, Respondents took the two cashier's checks back to Texas Coastal Bank and asked Texas Coastal Bank to cash them. When Texas Coastal Bank would not cash the checks, Respondents then requested that the checks be applied towards their outstanding loan obligations at Texas Coastal Bank. At that time, Respondent Dean Evans was a

member of the Board of Directors of Texas Coastal Bank, and Respondents were not in default under the loans for which they requested the offset.

On November 19, 1991, Respondents then filed for relief under Chapter 7 of the Bankruptcy Code. When Respondents filed their bankruptcy, they listed six creditors, but Petitioner's judgment debt was the only true unsecured debt that Respondents owed. Further, at the time of Respondents' bankruptcy, Respondents had a joint annual income of over $105,000. Respondents also had over $300,000 in an exempt pension plan. The sole reason for Respondents' Chapter 7 bankruptcy was to discharge Petitioner's Consent Judgment.

II. Federal Jurisdiction

This case arose under Title 11 of the United States Code. The Bankruptcy Court's decision was appealed to the District Court pursuant to 28 U.S.C. §§ 157 and 158(a). The District Court affirmed the Bankruptcy Court and this decision was appealed to the Fifth Circuit Court of Appeals pursuant to 28 U.S.C. §§ 157 and 158(a).

III. **Proceedings Below**

On November 19, 1991, Respondents filed a voluntary petition for relief under Chapter 7 of Title 11 of the United States Code (the "Bankruptcy Code"). On February 28, 1992, Petitioner timely brought a cause of action seeking to bar Respondents' discharge under 11 U.S.C. § 727 and seeking to impose an equitable lien on Respondents' homestead pursuant to the Texas Fraudulent Transfer Act, Tex. Bus. & Comm. Code § 24.001 *et. seq.*

The Bankruptcy Court granted summary judgment in favor of Respondents with regard to the 11 U.S.C. § 727(a)(2)(A) causes of action relating to Respondents' conversion of nonexempt assets because such conversion did not occur within the one year statutory period provided by 11 U.S.C. § 727(a)(2)(A), but held a trial on the merits regarding the transfer of the two cashier's checks by Respondents. The Bankruptcy Court also granted summary judgment for Respondents denying Petitioner's causes of action under Tex. Bus. & Comm. Code § 24.005, and denied

Petitioner an equitable lien pursuant to Tex. Bus. & Comm. Code § 24.008.

After trial, the Bankruptcy Court stated that Respondent's "purpose of keeping [the cashier's] checks. . . was to keep them from his creditors obtaining those monies." *See* APP-17. The Court specifically found "for intent," but denied "relief because I don't think you have the proper type of transfer . . .." *See* APP-22.

The Bankruptcy Court granted the Final Judgment in favor of Respondents which was entered of record on November 3, 1993. Petitioner perfected its appeal to the United States District Court on April 27, 1995. The United States District Court affirmed the Final Judgment of the Bankruptcy Court, and Petitioner perfected its appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit heard oral arguments and issued its opinion affirming the holdings of the District Court and the Bankruptcy Court on February 7, 1996.

REASONS FOR GRANTING THE PETITION

This Petition for writ should be granted because the decision of the Fifth Circuit Court of Appeals 1) involves an important question of federal law that has not been and should be settled by this Court; 2) sanctioned such a departure of existing law that it calls for an exercise of this Court's supervisory powers; and 3) has decided an important federal question in a way that conflicts with decisions of other United States Courts of Appeals on the same question.

I. Intent, Not The Type Of Transfer, Is The Operative Element Under 11 U.S.C. § 727(a)(2)(A)

The first question presented raises an issue that has not yet been decided by this Court; that is, whether the type of transfer made by the debtor, or whether the motive behind the transfer, is the operative element to bar a debtor's discharge under 11 U.S.C. § 727(a)(2)(A).

A. The Operative Element In 11 U.S.C. 727(a)(2)(A) Is Intent

11 U.S.C. § 727(a)(2)(A) provides that a debtor's discharge should be denied if he transfers property with the

intent to hinder, delay or defraud creditors. 11 U.S.C. § 727(a)(2)(A). The operative word in the statute is intent. The motivation or conduct behind the debtor's transfer is what a court must examine in determining whether a debtor should be discharged. The type of transfer is not relevant. No transfer will bar a debtor's discharge if it is determined by the trier of fact that debtor did not transfer the property with any intent to hinder, delay or defraud creditors. *See e.g., In re Miller*, 39 F.2d 301 (11th Cir. 1994).

B. A Preferential Transfer Can Be A Transfer For 11 U.S.C. § 727 Purposes.

Limiting the denial of a debtor's discharge by the type of transfer rather than the debtor's intent will erode the current definition of transfer as defined by the Bankruptcy Code.

11 U.S.C. § 101(48) defines transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . .." 11 U.S.C. § 101(48). *See In the Matter of Smiley*, 864 F.2d 562, 565 (7th Cir. 1989). Congress

intended the definition of transfer to be all-inclusive and as broad as possible to encompass any surrender of an interest in property. Senate Report No. 95-989, 95th Cong. 2nd Sess. 26-27 (1978), reprinted in U.S. Code Cong. & Admin. News 5787, 5813; *See also* House Rep. No. 95-595, 95th Cong. 1st Sess. (1977), reprinted in U.S. Code Cong. & Admin. News 5963, 6271; *Smiley*, 864 F.2d at 565. The Senate Report provides:

> "The definition of transfer is as broad a possible. Many of the potentially limiting words in current law are deleted, and the language is simplified. Under this definition <u>any transfer of an interest in property is a transfer</u>, including a transfer of possession, custody or control even if there is not transfer of title, because possession, custody and control are interests in property."

Senate Report No. 95-989, 95th Cong. 2nd Sess. 26-27 (1978), reprinted in U.S. Code Cong. & Admin. News 5787, 5813. [Emphasis added]

Only one Court of Appeals, prior to this case, has published an opinion on this issue. *See In re Miller*, 39 F.3d

301. Although the Eleventh Circuit in *Miller* held that "[a] mere preferential transfer of this sort is not tantamount to a fraudulent transfer for the purposes of denying discharge," the Eleventh Circuit still found that it was the debtors' motivation behind the preferential transfer which governed the issue of discharge. *Miller*, 39 F.3d at 307. The fact that the transfer made by a debtor who attempts to hinder, delay or defraud creditors is later voided as preferential and the money is brought back into the bankruptcy estate, does not and should not allow a court to enter a debtor's discharge under 11 U.S.C. § 727.

C. <u>The Decision of the Court of Appeals Is Erroneous.</u>

The Fifth Circuit did not give any credence to the Bankruptcy Court's specific finding that Respondents intended to hinder or delay creditors. The Fifth Circuit completely ignored the Bankruptcy Court's findings that "the purpose of keeping those checks was not just to keep them separate from his other funds, but was to keep them from his creditors obtaining those monies," *See* APP-17, "you have an intent,

as I said before, to keep this money from creditors," *See* APP-21, and "I'm going to find for intent, ..." *See* APP-22. The Fifth Circuit apparently did not believe that this was intent to hinder, delay or defraud. However, if the purpose of the transfer was to keep this money from creditors, it is preposterous to believe that it is not an intent to hinder or delay creditors as contemplated by 11 U.S.C. § 727(a)(2)(A). *See e.g., In the Matter of Bowyer*, 916 F.2d 1056, 1059 (5th Cir. 1990); *Smiley*, 864 F.2d at 568.

Since the Bankruptcy Court found actual intent to hinder or delay creditors, the Fifth Circuit erred in adopting the Bankruptcy Court's finding that the type of transfer, rather than the debtor's motive, governed whether the debtor should be denied his discharge. *See* e.g., *Miller*, 39 F.3d at 307.

D. <u>Significance of the Question Presented</u>

This question is important because if the type of transfer is used as the operative element for deciding discharge issues under 11 U.S.C. § 727, then the central purpose of the

Bankruptcy Code will be severely diminished. This Court has previously stated:

> "[T]hat although the central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life with a clear field for future effort unhampered by the pressure and discouragement of preexisting debt,' the 'fresh start' policy is limited to the "honest but unfortunate debtor."

Grogan v. Garner, 498 U.S. 279, 287; 111 S.Ct. 654, 659 (1991) *(citing Local Loan Co. v. Hunt*, 292 U.S. 234, 244; 54 S.Ct. 695, 699 (1934)).

If a court finds the requisite intent to hinder, delay or defraud, but grants a debtor's discharge anyway because the transfer was only a preference, the Court rewards the dishonest debtor who intentionally is attempting to keep or hide assets from certain creditors. Granting a discharge to a debtor who has transferred hidden assets to a friendly creditor with the specific intent to hinder or delay another creditor, unlike the debtor who pays one past due creditor over another

merely because of undue pressure by that creditor, or who pays a creditor without realizing he is making a preferential payment, contradicts the purpose and intent of Title 11. *See Grogan*, 498 U.S. 279; 111 S.Ct. 654. The Fifth Circuit's affirmance of the Bankruptcy Court's findings in this case rewards the dishonest debtor by letting him disguise his fraudulent transfer as a preference.

There has been no case that holds that a preferential transfer cannot be used to bar a debtor's discharge under 11 U.S.C. § 727(a)(2)(A), if such preferential transfer is done with intent to hinder or delay a creditor. *See* e.g., *Miller*, 39 F.3d at 307. This case is significant and requires this Court's guidance to ensure that the motive and intent behind a debtor's transfer of assets, not the type of transfer that has occurred, are the guiding factors in determining whether a debtor's discharge should be granted.

II. Determination of Intent is Inherently a Fact Issue

The second question presented requires this Court to exercise its supervisory powers in that the Fifth Circuit's

affirmance of the Bankruptcy Court's decision is such a departure from the existing law that a review by this Court is necessary. Further, the Fifth Circuit's finding that there was not sufficient summary judgment evidence to show intent is clearly erroneous and conflicts with their own decision in *International Shortstop v. Rally's, Inc.*, 939 F.2d 1257 (5th Cir. 1991). The Bankruptcy Court only found that the transfers were outside the one year period and did not consider the continuing concealment doctrine espoused by the Fifth Circuit in *In re Oliver*, 819 F.2d 550 (5th Cir. 1987). Therefore, the Bankruptcy Court did not evaluate whether a genuine issue of a material fact existed as to the debtor's intent, which is the only requirement that a nonmoving party must show. Fed. R. Civ. P. Rule 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248; 106 S.Ct. 2505, 2510 (1986). The Fifth Circuit's affirmance was merely a "rubber stamp" and is in direct conflict with its own decisions in *International Shortstop*, 939 F.2d 1257, and *In re Oliver*, 819 F.2d 550.

A. The Fifth Circuit's Decision Is In Direct Conflict With *International Shortstop* and *Oliver*

In *International Shortstop*, the Fifth Circuit held that the issue of intent always raises a fact issue. *International Shortstop*, 939 F.2d at 1265. When state of mind or intent is an essential element of the non-moving party's claim, summary judgment should not be granted. *Id.* at 1265. *Miller* v. FDIC, 906 F.2d 972, 974 (4th Cir. 1990); *National Union Fire Ins. Co. v. Turtur*, 892 F.2d 199 (2nd Cir. 1989); *Ross v. John's Bargain Stores Corp.*, 464 F.2d 111 (5th Cir. 1972); *Jones v. Borden Co.*, 430 F.2d 568, 574 (5th Cir. 1970).

A summary judgment is not appropriate because a party's state of mind or intent is inherently a question of fact that turns on credibility. *International Shortstop*, 939 F.2d at 1265. *Ross*, 464 F.2d 111. *See 60 Ivy* Street *Corp. v. Alexander*, 822 F.2d 1432 (6th Cir. 1987). Summary judgment in these cases is inappropriate because the non-moving party cannot generally challenge the "self-serving testimony" of the moving party. The fact finder can only observe the demeanor of a witness and assess his credibility through live cross

examination. *International Shortstop,* 939 F.2d at 1265; *Alexander,* 822 F.2d 1432.

B. The Decision of The Court of Appeals Is Erroneous

The Fifth Circuit upheld the Bankruptcy Court's summary judgment because "Bayshore did not submit sufficient summary judgment evidence as to Evans' intent to conceal the transfers, or to hinder, delay or defraud, and because the transfers did not occur within one year of the Evans' filing . . .." *See* APP-2. This finding by the Fifth Circuit not only misrepresents the findings of the Bankruptcy Court, but is directly contrary to the findings in *International Shortstop.*

1. Summary Judgment Was Inappropriate

This Court has stated that:

> "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Anderson, 477 U.S. at 248; 106 S.Ct. at 2510.

Petitioner presented deposition testimony and affidavits to show the Respondents' conversion of their assets which occurred outside the one year statutory period of

11 U.S.C. § 727(a)(2)(A) were done after Respondents had sued Petitioner, thereby preventing Petitioner from being able to discover this conversion. Petitioner could not fully challenge the "self-serving testimony" of Respondents because Respondents' intent was an issue of credibility. The same evidence which was not sufficient to defeat the summary judgment was presented at trial on the remaining causes of action to show debtors' intent as to the transfer of the cashier's checks, and the Bankruptcy Court did, in fact, find that Respondents had intent to delay or hinder creditors. *See International Shortstop*, 939 F.2d at 1265.

Under the standards for granting summary judgment when intent is an issue as set forth in *Anderson* and *International Shortstop*, the Fifth Circuit's affirmance of the Bankruptcy Court's summary judgment sanctioned such a departure from existing law that this Court should exercise its supervisory powers.

2. Respondents, Transfers Were A Continuing Concealment

Further, the Fifth Circuit's affirmance of the Bankruptcy Court's summary judgment is contrary to its decision in *Oliver*. In *Oliver*, the Fifth Circuit held that transfers from a debtor that occurred outside the one year statutory period could be brought into the one year period if the transfers were concealed and such transfers would be construed as a continuing concealment. *Oliver*, 819 F.2d at 551. The Seventh Circuit has also found that although a transfer is outside the statutory one year period of 11 U.S.C. § 727(a)(2)(A), if the transfer is made to avoid a judgment, it constitutes a "continuing concealment." *In re Kaufman*, 675 F.2d 127, 128 (7th Cir. 1981).

Concealment for purposes of denying a discharge has a broader meaning than simply secreting or hiding away assets; it also means preventing discovery of assets or withholding knowledge of assets. *See In re Cycle Accounting Services*, 43 B.R. 264, 270-71 (Bankr. E.D. Tenn. 1984). *In*

re Erdman, 96 B.R. 978, 986 (Bankr.N.D. 1988); *In re Kirch*, 97 B.R. 919, 923-24 (Bankr. N.D. Ill. 1988).

In this case, after Respondents defaulted on their loans to Petitioner, they sued Petitioner to prevent it from collecting and discovering their assets. Almost immediately after bringing the suit against Petitioner, Respondents engaged in a systematic scheme to convert all of their nonexempt assets into exempt assets. *See* Statement of Facts, *supra.* After Respondents had transferred all of their nonexempt assets into exempt assets and hidden their remaining cash in the two cashier's checks, Respondents gave the Consent Judgment to Petitioner for the full amount of its debt, and took nothing on their alleged claims. When Petitioner discovered the existence of the two cashier's checks, Respondents transferred the cashier's checks to a friendly "creditor" and possible insider. Respondents then filed their Chapter 7 petition to discharge the Consent Judgment. At the time Respondents filed their Chapter 7 petition, the only transfers which actually fell within the one year statutory period

of 11 U.S.C. § 727(a)(2)(A) were the transfers of the two cashier's checks. However, under the circumstances of this case, Debtor's systematic conversion of all of their nonexempt assets into exempt assets was a continuing concealment. *See Oliver,* 819 F.2d 550. *See also In re Reed,* 700 F.2d 986 (5th Cir. 1993) (the transfer of non-exempt property for exempt property, when effectuated with actual intent to place the property beyond the reach of creditors, is fraudulent).

The end result is that Respondents, who earn over $105,000 per year, were able to walk away scot-free from their only debt, but were able to retain the value of all of their assets, while Petitioner was left with a huge loss. Respondents essentially used the Bankruptcy Code to rid themselves of their bad business debts, not because they couldn't afford the debt, but simply because they did not want to pay the debt.

The Fifth Circuit's decision in this case is such a departure from their decisions in *Reed and Oliver* that this Court should exercise its supervisory powers and decide the

standard that should be followed in evaluating transfers which fall outside the statutory period of 11 U.S.C. § 727(a)(2)(A) that are done with the intent to hinder, delay or defraud.

III. The One Year Statutory Period of 11 U.S.C. 727(a)(2)(A) Conflicts With State Fraudulent Transfer Acts

The last two questions presented for review by this Court involve an inherent conflict between the discharge statute, 11 U.S.C. § 727(a)(2)(A), and states' fraudulent transfer acts. The intent and purpose of the Bankruptcy Code is to give honest debtors a "fresh start," but not to encourage and enlarge the debtors' ability to be free of risk for transferring property to hinder, delay or defraud creditors within a state's fraudulent transfer act.

A. The One Year Statutory Period Conflicts With The Four Year Statutory Period Under The Texas Fraudulent Transfer Act

The Texas Fraudulent Transfer Act allows a creditor to void transfers that are made with actual intent to hinder, delay or defraud any creditor of the debtor for the later of a period of four years from the time the transfer was made, or one

year from when the transfer could have reasonably been discovered. Tex. Bus. & Comm. Code § 24.010(a)(1). *See U.S. v. Chapman*, 756 F.2d 1237 (5th Cir. 1985).

Although the Texas Fraudulent Transfer Act does not speak directly to the discharge issue, it affords creditors a remedy to recover fraudulently transferred property, which becomes limited if the one year statutory period of 11 U.S.C. § 727(a)(2)(A) is enforced without consideration of the continuing concealment doctrine. *See Oliver*, 819 F.2d at 551. Without allowing the consideration of the continuing concealment doctrine, the Texas Fraudulent Transfer Act is meaningless if a person files bankruptcy. Since most states' fraudulent transfer statutes allow creditors to void transfers which occur up to four years, the statutory period of 11 U.S.C. § 727(a)(2)(A) limits creditors' remedies and rewards dishonest debtors.

Tex. Bus. & Comm. Code § 24.008 provides that a creditor may obtain an avoidance of the transfer; or, in the alternative, may obtain an attachment or other provisional

remedy against the asset transferred or its proceeds. Tex. Bus. & Comm. Code § 24.008(b). In addition, if the creditor has obtained a judgment, Tex. Bus. & Comm. Code § 24.008(b) provides that a court may order that the creditor can levy execution on the asset transferred or its proceeds. Tex. Bus. & Comm. Code § 24.008(b). *In re Mortgage America Corp.*, 714 F.2d 1266, 1272-73 (5th Cir. 1983); *Texas Sand Co. v. Shield*, 381 S.W.2d 48, 55 (Tex. 1964). The Texas Supreme Court has held that "a conveyance which is found to be fraudulent as to creditors is wholly null and void as to such creditors" and the "legal as well as equitable title remains in the debtor for purposes of satisfying debts." *Texas Sand Co.*, 381 S.W.2d at 54.

Further, under Texas law,

> "a creditor may follow property fraudulently conveyed by the debtor and subject the proceeds [of the transferred property] to the payment of the creditor's debt. The conversion of the property by the grantee into other property does not prevent the creditors from following the property into its converted form."

Chapman, 756 F.2d at 1241 (*citing* Texas Jurisprudence, "Creditors Rights & Remedies," § 566 at p. 570, 1976). The property or its proceeds which is fraudulently transferred, when found by the creditor, may be seized and executed upon as though the transfer had never taken place. *Texas Sand Co.*, 381 S.W.2d at 55; *See Chapman*, 756 F.2d at 1240.

The United States District Court for the Northern District of Texas has held that creditors are entitled to an equitable purchase money lien against a homestead if the funds used to purchase such homestead were funds creditors were defrauded from. *In re Greene*, 40 B.R. 807 (Bankr. N.D. Tex. 1984). *See also In re Jones*, 50 B.R. 911, 923 (Bankr. N.D. Tex. 1985) (funds obtained by fraud and used for down payment of homestead allows imposition of an equitable lien); *Maryland Casualty Co. v. Schroeder*, 446 S.W.2d 117, 120-21 (Tex.Civ. App.—El Paso 1969, writ ref'd n.r.e.) (embezzled funds used to purchase homestead allowed equitable lien to creditor).

Respondents' transfers of their nonexempt assets into their exempt assets were clearly done with the intent to hinder, delay or defraud Petitioner. But for the one year statutory period imposed by 11 U.S.C. § 727(a)(2)(A), Petitioner would have been able to impose an equitable lien on the Respondents' homestead for the amount of the fraudulently transferred property. By the finding that the transfers were outside the one year period, and ignoring the continuing concealment doctrine as discussed in Section II(B)(2) *supra*, the decision in this case deprives Petitioner of its remedies and rewards the dishonest Respondents.

IV. The Questions Presented Are Important

In an era where bankruptcies are fraught with fraud, it is extremely important to uphold the integrity of the Bankruptcy Code. Allowing debtors to manipulate the meaning and policy behind the Bankruptcy Code to the debtor's benefit and the detriment of creditors erodes the Bankruptcy Code, has a chilling effect on the lending practices of creditors, and could be detrimental to the general public as a whole.

The unlimited homestead exemption in states like Texas and Kansas are incentive for debtors, such as Respondents in this case, to keep their creditors in the dark about their conversion activities. *See Smiley*, 864 F.2d at 568. By allowing the debtor his discharge and by also denying the creditor the ability to either void the transfer or impose an equitable lien, creditors are left with nothing, and debtors end up with everything. This not only flies in the face of the "fresh start" policy of the Bankruptcy Code for the honest debtor, but also will have a chilling effect on the lending and credit industry.

If requisite intent to keep assets from creditors is found, as it was in this case, creditors should at the very least be allowed to void the transfers that occurred within the statutory period of a state fraudulent transfer statute, if such statutory period is longer than that provided by the Bankruptcy Code. At the very least, the creditor should be allowed to impose an equitable lien against the exempt property into which the transfers occurred.

If this Court refuses to set standards for all courts to follow when debtors intentionally transfer all of their nonexempt assets into exempt assets to hinder creditors, then debtors will receive the message that the way to keep your assets is to sue your creditors over frivolous matters, and while the litigation is progressing, transfer all of your nonexempt assets into exempt assets, wait two or three years until the statutory period has run under the Bankruptcy Code, give a consent judgment, and then declare bankruptcy to wipe out the judgment. After the debtor follows this procedure, *voila*, he gets to keep all his assets and not pay any of his debts. This is certainly not the intent of the Bankruptcy Code nor the message that should be given to debtors.

This case raises several issues that if not decided by this Court, would diminish the central purpose of the "fresh start" policy of the Bankruptcy Code. If the decision in this case is upheld, the dishonest debtor will be afforded more opportunity to hinder, delay or defraud his creditors, while creditors and honest debtors are injured. The creditors are

injured by a reduction of remedies available to them to collect their debts. This in turn will hurt honest debtors, because creditors will be less likely to extend credit. A chilling effect on lending practices will result in many people not being able to purchase items necessary for their health and welfare, which ultimately will decrease the economic stability in this country. This Court now, through this case, has the opportunity to remedy this trend and uphold the integrity of the Bankruptcy Code.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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